

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT A. WISEHEART,

Plaintiff-Appellant,

v

MICHAEL KEITHLY and VALERIE KEITHLY,

Defendants-Appellees.

UNPUBLISHED

April 20, 2006

No. 258700

Oakland Circuit Court

LC No. 2004-055236-CZ

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants on plaintiff's claims for trespass and ejectment, denying plaintiff's cross-motion for summary disposition, and declaring that defendants have title to a disputed strip of land based on the doctrine of acquiescence. We affirm.

In the summer of 2002 plaintiff approached defendants and informed them that their gravel driveway, log parking blocks, and a camper trailer were encroaching on his property. After defendants declined to move the alleged encroachments, plaintiff filed this action, alleging claims for trespass and ejectment. Defendants defended the claims by arguing that they had acquired the disputed land by acquiescence because the driveway had been in the same location well in excess of the 15-year statutory period, or, at the very least, they had a prescriptive easement to use the disputed strip as a driveway. The parties filed cross-motions for summary disposition. The trial court determined that there were no genuine issues of material fact and granted defendants' motion, concluding that defendants had acquired title to the disputed property by acquiescence.

On appeal, plaintiff first argues that the trial court improperly determined that title to the disputed land acquiesced to defendants because defendants never made a claim for title by way of a complaint, counterclaim, or cross claim. Issues of law are reviewed de novo. *St Clair Co Ed Ass'n v St Clair Intermediate School Dist*, 245 Mich App 498, 512-513; 630 NW2d 909 (2001).

"A trial court does not have authority to grant relief based on a claim that was never pleaded or requested at any time before or during trial." *Reid v State of Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000) (emphasis added). See also *Peoples Savings Bank v Stoddard*, 359 Mich 297, 325; 102 NW2d 777 (1960). Conversely, however, a trial court may

grant relief on a claim if the relief was requested before the trial court made a decision. It is axiomatic that issues that are not raised in the pleadings may be decided if the parties impliedly consent to consideration of those issues. *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). MCR 2.118(C)(1) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In this case, several weeks before the trial court heard the cross-motions for summary disposition, defendants were allowed to amend their answer and add the affirmative defenses of acquiescence and prescriptive easement. Several months before that time, defendants had raised those defenses in their motion for summary disposition. They specifically requested relief on the theory that they had actually acquired the disputed land by acquiescence. Plaintiff responded, in part, by arguing that defendants failed to prove that the disputed property belonged to defendants by acquiescence. Although defendants did not file a counterclaim seeking title by acquiescence, the issue was presented to the trial court through assertion of the affirmative defense to rebut plaintiff's trespass claim. By briefing and arguing the merits of the issue of ownership and by failing to challenge the lack of a counterclaim seeking title by acquiescence, plaintiff impliedly consented to the trial court's resolution of the issue of possession of the disputed property. We note that plaintiff cites no authority to support his claim that a defendant must file a counterclaim for acquiescence instead of relying on that theory as an affirmative defense to obtain relief. To the contrary, this Court has previously decided possession of property based on an affirmative defense, which was not separately pleaded as a counterclaim. See, e.g., *Mumrow v Riddle*, 67 Mich App 693, 696; 242 NW2d 489 (1976). Furthermore, in his complaint, plaintiff actually requested that the trial court restore possession of the property to him. Thus, plaintiff placed the issue of possession and ownership of the disputed property squarely before the trial court for resolution. Therefore, the trial court did not err in deciding the controlling issues before it, including who possessed the property in dispute as a matter of law.

Plaintiff additionally argues that the trial court improperly failed to wait the requisite seven days before entering the order granting summary disposition, which was presented under the seven-day rule. MCR 2.602(B)(3)(a). The record discloses that the trial court failed to wait seven days after presentation of the order before entering it. But plaintiff never moved for rehearing or reconsideration after the order was signed, and never formally challenged the signing of the order in the trial court. Therefore, we consider this issue unpreserved. Plaintiff must therefore demonstrate that entry of the order before the expiration of the seven-day period affected the outcome of the case. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Plaintiff has not made the requisite demonstration. He has not shown that any meritorious objection existed or that the order, as entered, was improper or failed to comport with the trial court's rulings.

Plaintiff also argues that the trial court improperly applied the doctrine of acquiescence. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a trial court's decision to grant a motion for summary disposition, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. The court should grant the motion only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002) (citations omitted).]

Additionally, the interpretation and application of the legal doctrine of acquiescence is an issue of law that is reviewed de novo. *St Clair Ed Ass'n*, *supra*.

When claiming acquiescence to a boundary line based on the statutory 15-year period, MCL 600.5801(4), there must be a showing that the parties acquiesced in the boundary line and treated it as the line for the statutory period, regardless of whether there was a bona fide controversy regarding the boundary. *Sackett v Atyeo*, 217 Mich App 676, 681-683; 552 NW2d 536 (1996). There is no requirement that possession be hostile or without permission. *Walters v Snyder (After Remand)*, 239 Mich App 453, 456-458; 608 NW2d 97 (2000). Boundary lines that are treated and acquiesced in as the true property lines are not to be disturbed based on new surveys. *Id.* Acquiescence must be shown by a preponderance of the evidence. *Id.* at 455. Tacking between previous owners to reach the statutory time period is permitted. *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964).

In this case, defendants owned their property since 1991 and treated the land on which the driveway sat as their own, maintaining and using it on a daily basis. Michael Keithly averred that he had researched the issue and discovered that there were no known disputes concerning the ownership of the driveway. Defendants' possession provided approximately 13 years of undisputed possession with the driveway in the same location. Their neighbor, Marvin Williams, extended that time frame, submitting a sworn statement indicating that he had plowed the driveway numerous times over the preceding 21 years and that it was always in the same place. At the hearing on the cross-motions for summary disposition, the results of a real estate tract inquiry regarding the background of the property were also discussed and considered. The results demonstrated that different property owners owned the adjoining lots as far back as 1979, although one owner owned both lots for a period. Additionally, aerial photographs, dating as far back as 1963, showed that the driveway had been in the same location at all times. Plaintiff did not produce any evidence to rebut that the 15-year period was not met.

We reject plaintiff's argument that gravel is not stationary and that the driveway boundary therefore must have changed over time. No evidence supports this argument. A party opposing a motion for summary disposition may not rely on mere allegations or denials, but must set forth specific facts to demonstrate the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Plaintiff did not establish the existence of an issue of material fact related to the 15-year statutory period. The trial court correctly interpreted and applied the doctrine of acquiescence to the facts of this case and properly concluded that there was no genuine issue of material fact that defendants acquired the disputed portion of the driveway by acquiescence.

In reaching our conclusion, we reject plaintiff's distinct, but related issue, that all of the evidence attached to defendants' reply brief and presented at the summary disposition hearing to support title by acquiescence, except for Williams's statement, should have been disregarded. Plaintiff argues that the trial court improperly permitted defense counsel to file a late reply brief, wherein he attached the additional evidence. The issue is not preserved for our review because plaintiff never objected below to the trial court's consideration of this evidence. Therefore, in order to prevail, plaintiff must demonstrate plain error affecting his substantial rights. *Kern, supra*. Plaintiff cannot make the requisite demonstration. There is no authority, and plaintiff cites none, to prohibit a trial court from allowing and accepting reply briefs in the context of summary disposition motions in its discretion.¹ In this case, the trial court expressly authorized the filing of the reply brief in its discretion. The reply brief was filed one week before the hearing was held.² No plain error exists.

Further, plaintiff has not demonstrated that the reply brief and its attendant exhibits affected the outcome of the proceeding. *Kern, supra*. If defendants had not presented the additional evidence before the hearing, the trial court could have asked for additional briefs and evidence before deciding the matter. MCR 2.116(E)(3). Moreover, even if the trial court denied the motion for insufficient evidence to support the 15-year tacking period, defendants could have revisited the issue in a second motion for summary disposition and presented the challenged information. MCR 2.116(E)(3) permits a party to file more than one motion under MCR 2.116, unless the motion is filed in bad faith, MCR 2.116(F). *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). For that reason, even if the filing of the reply brief and exhibits could be considered procedurally improper, defendants could file their motion anew and present the evidence then. Significantly, plaintiff never offered evidence to refute that the real estate tract history and aerial photographs establish that the driveway remained in the same place for longer than the statutory period of 15 years, nor does he contend on appeal that such evidence exists. Plaintiff bases his request for reversal solely on a procedural argument. Because he has not demonstrated that the outcome of this case would have been different if defendants were denied the right to file a reply brief before the hearings, reversal is not required. *Kern, supra*.

It is necessary to briefly address plaintiff's argument that his counsel did not receive the reply brief and exhibits until October 9, 2004, ten days after the September 29, 2004, hearing. The record discloses that the reply brief and exhibits were discussed at the summary disposition

¹ Plaintiff cites MCR 2.118 for the proposition that a written motion must be filed to obtain permission to file a reply brief. The cited court rule is inapplicable because it relates to the filing of supplemental *pleadings*. The term "pleadings," as used in the court rules, does not apply to motions or briefs. MCR 2.110(A).

² In the context of this issue, plaintiff makes serious allegations of misconduct against defendants' counsel and argues that he misled the trial court into postponing the summary disposition hearing by one week in order to file the reply brief before the hearing. This issue is not raised in plaintiff's statement of the questions presented and review is inappropriate. *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

hearing, but plaintiff neither informed the trial court at the time of the hearing that he was not in possession of these items, nor object to the trial court's consideration of the items. Instead, plaintiff challenges these items for the first time on appeal. Even if we accepted that plaintiff's counsel did not receive the reply brief and exhibits before the summary disposition hearing, plaintiff does not explain why reversal would be required. As previously discussed, plaintiff has not shown that, if this case was remanded based on a procedural irregularity, a different outcome would result. Thus, he has not established a plain error requiring reversal. *Kern, supra*.

Plaintiff also argues that the trial court abused its discretion by permitting defendants to amend their affirmative defenses shortly after discovery closed. This Court reviews a trial court's decision on a motion to amend affirmative defenses for an abuse of discretion. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004), citing *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

Leave to amend should be freely granted when justice so requires. MCR 2.118(A)(2). However, leave to amend should not be granted in the face of undue delay, bad faith, or dilatory motive on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment. [*Ostroth, supra*.]

In this case, defense counsel did not file the initial answer, but readily admitted his complicity in failing to take action to ascertain the existence of, and correct, deficiencies in the answer. Nothing in the record supports, however, that defense counsel's failure to move to amend the answer to add affirmative defenses at an earlier date was motivated by bad faith or dilatory motive. In fact, defense counsel provided plaintiff with actual notice of defendants' theories and defenses in April 2004, when he filed a motion for summary disposition. Counsel never attempted to hide any affirmative defenses or engage in procedural gamesmanship.

Moreover, there was no delay in this case that would warrant denial of the motion to amend. Delay alone does not require denial of a motion to amend. *Lown v JJ Eaton Place*, 235 Mich App 721, 726 n 3; 598 NW2d 633 (1999). Undue delay, however, can result in the denial of an amendment. In *Ostroth, supra*, this Court found that no undue delay or bad faith existed in a situation similar to the one here. In that case, the defendant failed to assert a statute of limitations defense in its previous answers and did not move to amend its affirmative defenses until after it raised the statute of limitations defense in a motion for summary disposition. *Id.* In ruling that there was no undue delay, this Court noted that the plaintiff had an opportunity to respond to the issue. *Id.*

In *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344; 568 NW2d 847 (1997), this Court concluded that there was no undue delay where the motion for leave to amend was filed 2-1/2 months before the close of discovery, 3-1/2 months before mediation, and five months before trial. *Id.* More importantly, this Court ruled that the remedy for undue delay is not to deny the amendment but to sanction the offending party to reimburse the opponent for the additional expenses and attorney fees caused by the delay in requesting the amendment. *Id.* In this case, the motion to amend was filed within days of the closing of discovery, less than one week after plaintiff responded to defendants' motion for summary disposition. However, the proposed amendment comported with defenses about which plaintiff was aware since April 2004, when defendants filed their motion for summary disposition. Trial was not scheduled for more than four months after defendants moved to amend. Further, the

amendment did not seek to inject new theories or defenses into the case. In permitting the amendment, the trial court indicated that it was willing to consider reopening discovery and would also consider awarding costs to plaintiff incurred as a result of the amendment. We conclude that no undue delay existed to deny defendants the right to amend.

Additionally, there was no prejudice to plaintiff that required denial of defendants' motion to amend.

A trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and *the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory . . . Id.* [Lown, *supra* (citations omitted; emphasis added).]

"The mere fact that an amendment might cause a party to lose on the merits is not sufficient to establish prejudice." *Ostroth, supra*. The type of prejudice that would require denial of a motion to amend is the type of prejudice that prevents a party from having a fair proceeding. *Traver Lakes, supra*. It is not "prejudice arising from the amendment's effect on the result of trial or loss of a meritorious claim or defense." *Id.*

In this case, plaintiff argues prejudice because the amendment caused him to lose his case on the merits. This type of prejudice is not the type of prejudice that requires denial of a motion to amend. *Id.*; *Ostroth, supra*. Further, prejudice did not exist simply because discovery was closed. The record supports that plaintiff was notified of the defenses of acquiescence and prescriptive easement by way of defendants' motion for summary disposition, which was filed more than three months before discovery closed. Although plaintiff had reasonable notice that defendants were relying on those defenses, he took no steps to engage in any discovery during that time. Because plaintiff had notice of defendants' defenses numerous months before discovery closed, we reject his argument that he was prejudiced by the late amendment. The trial court did not abuse its discretion in granting defendants' motion to amend their affirmative defenses.

Finally, defendant argues that the trial court abused its discretion when it disqualified his wife from acting as his attorney. Because we affirm the trial court's order granting summary disposition, this issue is moot. An issue becomes moot where a subsequent event renders it impossible for this Court to fashion a remedy. *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 66 n 10; 678 NW2d 444 (2003).

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald